Filed 6/4/19 In re X.S. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re X.S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. X.S., Defendant and Appellant.	F077643 (Kern Super. Ct. No. JW136116-02) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Lorna H. Brumfield, Judge.

Candice L. Christensen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Peña, J. and DeSantos, J.

BACKGROUND

On November 3, 2017, the Kern County District Attorney filed a juvenile wardship petition concerning minor appellant X.S. The petition alleged appellant willfully and unlawfully drove or took a vehicle without consent (count 1; Veh. Code, § 10851, subd. (a)) and received a stolen vehicle (count 2; Pen. Code, § 496d.)

Appellant initially admitted both counts, but subsequently changed his plea to a denial. After a jurisdictional hearing on March 28, 2018, the court reduced both counts to misdemeanors and found them both true.

At the dispositional hearing, the court continued appellant on a prior grant of probation. Under the terms of probation, appellant was committed to Camp Erwin Owen. Upon the "completion" of the Camp Erwin Owen program, appellant would be released to the custody of his mother. He now appeals.

FACTS

Jack McGee has property in Kern County. A couple named Lori and Don Mead left a golf cart at McGee's property, so he could fix it for them.

On October 19, 2017, at about 4:30 p.m., McGee fed his horses and sat on his porch to read.[1] McGee "heard a noise" and saw appellant driving the Meads' golf cart. McGee got into his truck and chased the golf cart. McGee pulled up "right next to" appellant and told him to pull over. McGee told appellant the golf court was his (i.e., McGee's). Appellant said the golf cart was his grandmother's. Appellant would not pull over. McGee had planned to "run him into" a fence with his truck, but the golf cart went through a hole in the fence. Appellant then jumped a curb with the golf cart, jumped a median and escaped into the neighborhood.

[1] At the time, McGee's "gates" were not closed. It is unclear exactly where the "gates" were.

McGee called Lori Mead and her sister-in-law and told them the golf cart had been stolen. They wanted McGee to file a police report, but McGee said, "It's not mine to make a police report."

McGee had never seen appellant on his property before and did not authorize him to be on the property. Lori Mead did not tell McGee that anyone was coming to get the golf cart that day.

On cross-examination, McGee was asked, "And as far as you know, Lori and Don Mead could have said, "Sure, go use the golf cart"? Could have, right?" McGee answered, "Could have."

On the morning after the golf cart incident, McGee noticed an iPad that had been in the glove box of his pickup truck was missing. The pickup truck had been parked about 120 feet from the golf cart.

I. There Was Substantial Evidence of Lack of Consent

Appellant argues there was insufficient evidence he lacked the owner's consent to take the golf cart.

A. Lack of Consent Under Vehicle Code Section 10851

Vehicle Code section 10851 prohibits any person from driving or taking a vehicle they do not own "without the consent of the owner thereof."[2] (Veh. Code, § 10851, subd. (a).) Under the plain language of the statute, the prosecution must prove lack of consent. (See *People v. Rodgers* (1970) 4 Cal.App.3d 531, 534 (*Rodgers*).)

B. Substantial Evidence Review

The standard for reviewing a claim of insufficient evidence in a juvenile proceeding is the same as the one applied in criminal proceedings. (*In re Sylvester C.*

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[2] The statute also has an intent element, requiring the taking be done "with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without the intent to steal the vehicle…." (Veh. Code, § 10851, subd. (a).)

(2006) 137 Cal.App.4th 601, 605.) "[W]e review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Ibid.*, fn. omitted.) " 'We must presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence [citation] and we must make all reasonable inferences that support the finding of the juvenile court.' " (*In re Gary F.* (2014) 226 Cal.App.4th 1076, 1080.)

C. Circumstantial Evidence of Lack of Consent

Appellant emphasizes that the evidence of lack of consent from the owner was "only circumstantial" because the Meads did not testify, and McGee "has no personal knowledge of whether the Meads gave [appellant] permission." (See *Rodgers, supra,* 4 Cal.App.3d at p. 534 [prosecution must show defendant lacked consent of owner].)

However, like most facts, lack of consent can be shown by direct *or* circumstantial evidence. (*Rodgers, supra,* 4 Cal.App.3d at p. 534.) Here, there was plenty of circumstantial evidence the Meads had not given appellant permission to take the golf cart.[3] When McGee called Lori Mead after the golf cart had been taken, she and her sister-in-law responded by telling McGee to file a police report. This would be quite an unusual response if the Meads had given permission for someone to take the golf cart.

Additionally, the fact that Lori Mead never told McGee ahead of time that someone would come to pick up the golf cart raises an inference that she had not permitted appellant to retrieve it.

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[3] The parties delve into a dispute on the definition of an "owner" for purposes of Vehicle Code section 10851. (See Veh. Code, § 460.) We need not resolve that issue because even if McGee does not qualify as a bailee or some other type of quasi-owner, there is sufficient circumstantial evidence the Meads themselves did not give appellant permission to take the golf cart.

Moreover, appellant refused to pull over the golf cart when confronted by McGee and jumped a curb and a median to get away. One can infer that if appellant had permission, he would have simply stopped and explained it to McGee.

Because these inferences are reasonable and favorable to the juvenile court's finding, we accept them. (See *In re Gary F.*, *supra*, 226 Cal.App.4th at p. 1080.)

D. In Light of Substantial Evidence in Support of Juvenile Court's Finding, We Will Not Indulge Inferences Unfavorable to that Finding

Appellant argues that some evidence at the hearing raised an inference that he had consent. For example, appellant drove past McGee in broad daylight; appellant told McGee the golf cart belonged to his grandmother; there was no testimony that appellant damaged or hotwired the golf cart; McGee had left the gate to this property open; and appellant's failure to pull over could have been borne from a desire to avoid violence from McGee. (Compare *In re J.R.* (2018) 22 Cal.App.5th 805, 815, rev. granted Aug. 15, 2018, S249205 [incident occurred at 4:30 in the morning; vehicle was tampered with].) However, these contentions must fail, given our standard of review. If evidence raises several reasonable inferences, we accept the one favorable to the juvenile court's finding. (*In re Gary F.*, *supra*, 226 Cal.App.4th at p. 1080.) "If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*In re M.S.* (2019) 32 Cal.App.5th 1177, 1185.)[4]

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[4] Appellant also contends the court improperly observed in its ruling that no one had testified that they had said, "Hey, I'm letting my grandson borrow it. No problem. Leave him alone."

However, while making that observation, the court also specifically said it was not "burden shifting" and was simply making observations about the "circumstantial evidence."

"A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or

E. We Accept the Attorney General's Concession that Count 2 Must be Reversed

The juvenile court found true both counts. The Attorney General concedes that since the court found appellant "took" the vehicle in count 1, it could not also find true a count for "receiving" the same vehicle in count 2. We accept the concession. (See *People v. Calistro* (2017) 12 Cal.App.5th 387, 394–396.)

DISPOSITION

The true finding adjudication on count 2 is reversed. In all other respects, the juvenile court's orders are affirmed. The matter is remanded for a new dispositional hearing.

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her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340 [referring to prosecutor's comments].) The court's comments were not improper.